Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ITTELLA FOODS, INC.,
Petitioner,

vs.

ZURICH INSURANCE COMPANY and
NORTHERN INSURANCE CO. OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit violate the most basic tenets of judicial review, thereby undermining the very integrity of the judicial process, by summarily reversing a $12 million punitive damages award rendered by a unanimous jury and affirmed in the detailed written decision of a respected District Court judge, where:

A. The only facts about the case which the Ninth Circuit even mentioned were that "reasonable people could conclude that the insurance company was trying to chisel Ittella Foods...";

B. The Ninth Circuit never even mentioned the District Court's written findings, much less explained why they allegedly were clearly erroneous and should therefore not be accepted; and

C. The Ninth Circuit never explained how or why the conduct at issue allegedly did not satisfy California's punitive damages law?

PARTIES TO THE PROCEEDING

Petitioner is Ittella Foods, Inc., a California corporation whose stock was wholly owned by members of the Galletti family. Subsequent to the trial, the corporation was sold, but the family retained rights to the proceeds of the litigation.

Respondents are Zurich Insurance Company and Northern Insurance Company of New York ("Northern"). Northern is a wholly-owned subsidiary of Maryland Casualty Company, a Maryland corporation. Maryland Casualty Company is a wholly owned subsidiary of Zurich American Insurance Company, a New York corporation. Zurich American Insurance Company is a wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation. Zurich Holding Company of America, Inc. is a 99.8711% owned subsidiary of Zurich Insurance Company, a Swiss corporation. Zurich Insurance Company is a wholly owned subsidiary of Zurich Group Holding, a Swiss corporation. Zurich Group Holding is owned 43% by Allied Zurich p.l.c. and 57% by Zurich Financial Services. Allied Zurich p.l.c. is a wholly owned subsidiary of Zurich Financial Services. Zurich Financial Services is the only publicly traded parent company, with a primary listing on the Swiss stock exchange and a secondary listing on the London stock exchange, and a further trading of American Depositary Receipts.

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OPINIONS BELOW

The unpublished Memorandum decision of the Court of Appeals for the Ninth Circuit is reprinted as Appendix A. The Ninth Circuit's Order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* is not reported and is reprinted as Appendix B.

The order of the United States District Court for the Central District of California denying Respondent's Rule 50 Motion Regarding Punitive Damages is not reported and is reprinted as Appendix C.

JURISDICTION

The Ninth Circuit issued its Memorandum decision on May 21, 2004. On June 4, 2004, Petitioner filed a Petition For Panel Rehearing And Suggestion For Rehearing *En Banc*. Both petitions were denied on July 1, 2004.

The Court has jurisdiction to review the Ninth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Overview Of The Case

This case arises from Respondent insurance company's wrongful denial of insurance benefits owed to Petitioner. At the trial, the jury found that Respondent's conduct constituted bad faith and that there was clear and convincing evidence of malice, fraud and oppression warranting imposition of punitive damages under California Civil Code § 3294(a). The jury awarded Petitioner $12,000,000 in punitive damages. The

District Court also awarded Petitioner attorney's fees – which are recoverable under California law when an insurance company is found to have acted in bad faith – in the amount of $332,402.50.[1]

In ruling on Respondent's Rule 50 motion, the District Court set forth fact-specific findings which demonstrated the existence of clear and convincing evidence of malice and oppression in two respects: (1) Respondent had engaged in despicable conduct with a willful and conscious disregard of the rights of Petitioner; and (2) Respondent had subjected Petitioner to cruel and unjust hardship in conscious disregard of its rights. The District Court's findings further established that there was clear and convincing evidence that Respondent's conduct constituted fraud.

On appeal, the Ninth Circuit panel issued a Memorandum decision which never addressed any of the specific factual findings which the District Court had held constituted clear and convincing evidence warranting the imposition of punitive damages. Rather, the Panel summarily concluded, without any other discussion of the facts:

> In this case, assuming arguendo that the insurance company did deny coverage in bad faith and failed to pay the roughly half-million dollars that it owed until being bludgeoned with a lawsuit, the evidence nevertheless does not permit the conclusion that California's strict punitive damage standard was met. Reasonable people could conclude that the insurance

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[1] After Respondent filed a separate appeal challenging the amount of attorney's fees, the parties stipulated to fix the amount at $315,782.39, with entitlement to them dependent upon whether the bad faith verdict was upheld.

> company was trying to chisel Ittella Foods, but they simply could not conclude that its conduct rose to the extreme level required by [California's] statutory standard.
> (Appendix A-5)

This cursory statement reflects the only purported explanation of why the Panel rejected the jury's verdict and the (never-even-mentioned) District Court's detailed findings that the verdict was supported by clear and convincing evidence. In refusing to indicate why the District Court's findings were clearly erroneous, the Panel drastically departed from the accepted and usual course of judicial proceedings.

Certiorari is warranted in order to consider whether this decision should be rejected as an affront to the very integrity of the judicial process.

II. Background of the Case

The only background facts which are necessary to consideration of this Petition are the District Court's detailed findings and those additional generalized facts necessary to give context to the Court's findings.

Petitioner Ittella Foods, Inc. is a food processing company that sells a number of products, including seafood salad. Ittella purchased insurance, including a CGL (commercial general liability) policy, from Respondent Northern Insurance Co., a wholly owned subsidiary of Zurich Insurance Company ("Northern").

In late September and early October, 2000, Petitioner distributed seafood salad product to Safeway outlets in the United States and Canada. The Canadian government took a routine sampling of Petitioner's seafood salad that was stored in a Safeway warehouse in Canada and determined that it contained positive traces of the bacteria *Listeria monocytogenes*. The letter from the Canadian Government advising Ittella of the findings indicated that they were treating "this issue" as a "Class II recall" -- a classification which did *not* require Ittella to take any action.

In order to avoid any health hazard to the public, Ittella voluntarily recalled and destroyed more than 100,000 pounds of possibly contaminated product; most from warehouses in the United States (that Canada had no jurisdiction over). In addition, Ittella consulted with a microbiologist regarding steps to take to rid its plant of *Listeria,* so that further contamination of its product would not occur. Finally, subsequent to destruction of the contaminated product, Ittella voluntarily notified the FDA about what had occurred and the steps they were taking to clean the plant.

Immediately after the problem arose, Ittella had its broker, Speare, notify Northern that it was making a claim for the value of the destroyed product and the temporary disruption of its business.

In October 2000, the original independent adjuster assigned to the claim notified Northern that the claim implicated a preliminary estimated product loss of $421,000. (Appendix C-4) In November, the second adjuster on the claim similarly notified Northern that Ittella was seeking coverage for both product loss under the [$4 million limits] Property Coverage section of the policy and product recall expenses. (Appendix C-4)

On November 9, 2000, Northern's management recognized that "the overall impact of the case is not product recall" and that the "big exposure is the first party [property coverage] claims by the insured." (Appendix C-4) Similarly, by December 14, the third adjuster (Myron Wasiunec) had concluded that the "product itself [was] not covered in [the] liability portion's product recall coverage;" i.e., it was not subject to the mere $50,000 liability limit of that coverage. (Appendix C-4)

Yet, on January 4, 2000, the adjuster, with the approval of his manager (Carol Stark), informed Ittella that the approximately $185,000 claimed loss for destroyed product was subsumed under the Product Recall Coverage Expense $50,000 limit of liability. (Appendix C-4-5) Northern never responded to the claim under the Property Coverage until January 29, 2001 when, in response to a letter from Ittella's broker challenging the efficacy of the denial of benefits articulated in the company's January 4 letter, it first mentioned and then applied three brand new purported exclusions -- Governmental Action; Ordinance or Law; and the Pollution Exclusion -- as a bar to coverage. (Appendix C-5) Stark approved this denial letter even though she admitted on cross-examination that she knew that the Governmental Action Exclusion only applied if a governmental seizure had occurred and that she realized that no government has seized any of Ittella's product. (Appendix C-5)

The District Court drew the following specific conclusions from the evidence:

(1) "Northern consciously avoided paying out under the Property Coverage despite knowing full well that was the 'big exposure' issue." (Appendix C-5)

(2) "[O]nce Northern finally realized that it would have to address Ittella's claim for the value of product loss under the first-party Property coverage provisions, it applied coverage exclusions [including] the Government Exclusion that it *knew* did not apply." (Appendix C-5) [italics in original]

(3) Northern "engaged in such actions even though it knew that the losses suffered by Ittella were significant." (Appendix C-5-6)

Having sat through the lengthy trial, the District Court found "that the above conclusions are not only 'consistent with the hypothesis of malice, fraud, gross negligence or oppressive' but are 'inconsistent with the hypothesis that such tortious conduct was the result of a mistake of law or fact, honest error or judgment, overzealousness, mere negligence, or other such noniniquitious human failing.'" (Appendix C- 6-7)

The District Court further found that its "conclusions also support the level of 'despicable conduct' required for malice and oppression and that there is a "high probability" that Northern carried on such conduct with a willful and conscious disregard of the rights of Ittella and subjected Ittella to cruel and unjust hardship in conscious disregard of Ittella's rights. (Appendix C-7)

Finally, the Court found that "the conclusions support a 'high probability' that Northern's conduct constituted fraud, both with respect to its attempt to con Ittella into believing that its product loss claim was covered by the Product Recall coverage and with respect to its claim that the Governmental Exclusion was applicable when the carrier knew otherwise." (Appendix C-7)

For all of these reasons, the District Court found that clear and convincing evidence supports the jury's verdict that Northern is guilty of malice, oppression or fraud, and denied Northern's Rule 50 motion. (Appendix C-7)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Panel did not even attempt to reconcile its reversal of the punitive damages award with the findings of the District Court. Indeed, it did not even bother to mention the findings set forth in the lower court's decision, let alone to indicate why, allegedly, they were so clearly erroneous as to justify being entirely reversed. Instead, in summarily holding that no reasonable jury could have awarded *any* punitive damages at all, the Panel basically applied an "I-know-it-when-I-see- it" approach and never articulated why the punitive damages judgment warranted reversal.

The Opinion conflicts with U.S. Supreme Court precedent concerning the standard of review – and degree of deference – to be applied in reviewing the question of whether or not punitive damages may be assessed. (FRAP, Rule 35(a)(1).) The Panel's approach cannot be reconciled with the standard of review in punitive damages cases, as articulated by this Court in *Cooper Industries Inc. v. Lumberman Tool Group, Inc.*, 532 U. S. 424 [121 S. Ct. 1678] (2001).[2]

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[2] In fact, the Panel's approach conflicted with the Ninth Circuit's own standard, as reflected in the *en banc* decision in *Lambert v. Ackerly*, 180 F.3d 997, 1012 (9th Cir. 1999), in which the Ninth Circuit addressed the sufficiency of evidence supporting a punitive damages award and clearly stated: "[w]e cannot disturb the jury's verdict if it is supported by substantial evidence. (Citations omitted.)"

In *Cooper, supra,* 532 U. S. at 435 and 440, n. 14, this Court held that the factual findings made by the district courts in conducting an inquiry regarding punitive damages *must* be accepted "unless clearly erroneous . . . ." [3] The Memorandum decision made a mockery of that injunction.

Moreover, this Court's punitive damages case law has emphasized the due process rights of defendants. Here, it was the plaintiff whose due process rights were trampled. The Ninth Circuit Panel extinguished a significant property right – a duly entered jury verdict reviewed and approved by a District Court – without even bothering to explain why.

Even though the Panel's decision was not published, it is likely to have a major impact on the insurance industry. This decision will undoubtedly reverberate throughout the corporate boardrooms of carriers emboldened by the notion that they can cheat insureds out of benefits with impunity.

The Memorandum decision also tramples on principles of federal-state comity. The verdict was fully consistent with California's substantive insurance bad faith law codified in California Civil Code § 3294, which authorizes punitive damages where the trier of fact determines, by clear and convincing evidence, that the insurance carrier engaged in despicable conduct which: (1) subjected the insured to cruel and unusual hardship in conscious disregard of that person's rights [oppression]; (2) is carried on with a willful and conscious disregard of the rights of the insured [malice]; and/or (3) constitutes an intentional misrepresentation of a material fact with the intention of depriving the insured of its

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[3] In contrast, this Court held that the *proper amount* of punitive damages (as opposed to the propriety of awarding *any* punitive damages) was to be decided under a *de novo* standard. *Ibid.*

rights [fraud].[4] The Panel substituted its own view that punitive damages should not be awarded, despite the District Court's specific findings. It had no right to impose that view on California citizens.

The integrity of the judicial process is of principal importance. Intervention by the United States Supreme Court, through a grant of certiorari, is appropriate where, like here, a Court of Appeals has departed so drastically from the accepted and usual course of judicial proceedings that the entire judicial system is undermined. U.S. Supreme Court Rule 10(a).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: September 10, 2004.

Respectfully Submitted,

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[4] As noted, *supra*, the District Court made precisely these factual conclusions in its Order denying Northern's Rule 50 motion for a new trial.